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41569—25——1

In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES OF AMERICA, appellant
v.
HOLT STATE BANK, DEPOSIT BANK OF Winona, Federal Land Bank of St. Paul, et al.

No. 337

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

STATEMENT

The two courts below concurred in finding that Mud Lake was a navigable body of water. They assumed that title to its bed passed to the State on her admission to the Union. They then applied the local law whereby the State resigns her title in the bed of navigable waters to the riparian owners. If these propositions—one of fact and one of law—were true, the result would necessarily follow,

for neither the Indians nor the United States would have had any right or interest in the lake bed.

But in finding the fact of navigability the two courts made a fundamental error of law, for they applied the tests of the local law, which recognizes as navigable inland lakes, not adapted to commercial navigation but capable of public use for sailing, rowing, fishing, fowling, taking water for domestic or agricultural uses, etc. (R. 455.) But this court, where the rights of the United States are involved, applies the test of navigability for commercial purposes. *Oklahoma* v. *Texas*, 258 U. S. 574, 585; *Brewer-Elliott Oil Co.* v. *United States*, 260 U. S. 77. So that the court will decide on the evidence unembarrassed by the concurring findings.

The Circuit Court of Appeals also held in the alternative that if the lake was nonnavigable its bed passed to the riparian owners under the local law and the rule of *Hardin* v. *Jordan*, 140 U. S. 371, and the cases following it.

We think the courts were wrong as to both propositions of law. We maintain in the first place that even if the lake was navigable its bed did not pass to the State, because the Indian reservation was not under her jurisdiction or subject to her sovereignty, and its waters, as well as its lands, had been devoted by the Government to a public purpose of the United States prior to the admission of the State and continuously since.

In the second place, we maintain that if the lake was nonnavigable the local law did not apply, because it was the plain intention of the agreement of cession that the beds of small shallow lakes capable of drainage should be classed as agricultural lands and sold for the benefit of the Indians.

We deal first with the second proposition.

ARGUMENT

I

On the assumption that Mud Lake was nonnavigable

1. *Mud Lake was nonnavigable according to the tests applied by this court when the rights of the United States are involved.*

We have quoted in part and summarized the evidence in our original brief and cited the applicable authorities. Some additional circumstances will appear incidentally under subsequent headings.

2. *Status of Red Lake Reservation, nature of the cession, and how the instruments of cession are to be construed.*

The part of Red Lake Reservation ceded under the Nelson Act was the subject matter of the litigation in *Minnesota* v. *Hitchcock*, 185 U. S. 373. In that case Minnesota sought to enjoin the Secretary of the Interior from selling sections 16 and 36 of the ceded lands, claiming that they had passed to the State under the school land grant. The court held, however, that the school land grant did not apply, and the bill was dismissed. In reaching

that conclusion the court decided the following propositions:

> 1. Red Lake Reservation, as it existed before the cession under the Nelson Act, was a true Indian reservation with all that that implies (pp. 389, 390).
>
> 2. The cession was not absolute but in trust, and the lands did not become "public lands" of the United States (pp. 394, 395).
>
> 3. The Nelson Act and the cessions pursuant to it are to be construed according to the rules applicable to Indian treaties; that is, as the Indians would naturally have understood them (p. 396).

As the school grant did not apply to these lands, it follows that the swamp-land grant was also excluded. This has always been recognized by the State, and she has never claimed any of the Red Lake ceded lands under it.

3. *Whether the beds of nonnavigable meandered waters pass by government conveyances of the uplands is purely a question of intention. Only where the intention was not otherwise shown does the court presume that it was in accordance with the rule of the local law.*

This proposition was clearly and definitely announced in *Oklahoma* v. *Texas*, 258 U. S. 574, 595. If the intention can be gathered from the treaty or agreed act of cession, construed most favorably to the Indians and as applied to the character and condition of the ceded lands, then there is no occasion to resort to the local law for a *presumed* intention.

4. *Mud Lake was simply a part of the great swamp. Its bed was substantially on a level with the soil under the vegetation and peat beds of the swamp. The swamp and the lake were drained at the same time and by the same main ditch. The lake bed became fit for tillage even before the surrounding swamp lands.*

In House Document No. 607 (59th Cong., 2d sess.), cited in our original brief, the engineer who made the government drainage surveys thus describes the region embracing Mud Lake:

> The Chippewa lands ceded under the Nelson Act of 1889 cover an area of over 5,000 square miles in northern Minnesota. As it was obviously impracticable to survey and report upon the entire area in the first season it was decided to map the section where conditions are worst at once and to extend the work over the remainder as rapidly as possible.
>
> After consultation with the settlers and business men of the region in question, it was agreed that the work was most urgently needed northeast of Thief River Falls.
>
> The general conditions throughout the ceded Chippewa lands are such as to make the construction of drainage works a prerequisite for occupancy.
>
> The land is extremely flat, and while the surface soils are readily cultivated if

drained they rest on an impervious subsoil with insufficient slope to let the water run off.

The natural drainage such as it is in the Red Lake reservation (which includes two-thirds of the ceded area) goes out from an approximately central point, through Rainy, Rosseau, Thief, and Red Lake rivers, flowing in different directions. Considerable fear has been expressed by the inhabitants that should the drainage from this tract be discharged into the Red River of the North the already dangerous floods which occur in the spring would be so augmented as to be destructive.

For various reasons, however, no such fear is apt to be realized.

It is more than likely that after surveys of the entire tract have been completed it will be found practicable to divert a part of the natural drainage into artificial channels toward Rainy and Rosseau rivers.

The flood waters coming from the present drainage plan will not reach the Red River till after the high water of that stream has passed.

Moreover, once the swamps are drained they will be able to absorb a large percentage of any heavy rains which may come instead of discharging the water immediately, as is the case in their saturated condition.

In the area surveyed many thousands of acres of land have been patented, and occasionally it has been possible to raise a crop.

But for much of every year the land is so soaked in water as to be unfit for cultivation.

At certain seasons the people are entirely isolated, on account of the impassability of the country surrounding them, and they have been reduced to dire poverty by their inability to secure outlets for such ditches as they have been able to dig.

A very large part of the area is public land,[1] and it is through this land that the needed outlets must be constructed. This bars both the inhabitants as individuals and the State of Minnesota as a whole from undertaking any relief work.

The tract is situated favorably for raising wheat and other grain crops, and the soil, which is a rich, black loam, covered with a layer of peat and resting on blue clay and gravel, is the best land which could be found for these crops. Such lands, when drained, sell in that vicinity for $8 per acre, while the public land adjoining them is not taken up even at its price of $1.25 per acre.

* * * * *

The conditions governing the relation between run-off of streams and precipitation are unusual in the region under consideration. Not only is the relief exceedingly low, but the underlying stratum of impervious clay is covered by a layer of peat, often several feet thick, which, acting as a huge sponge, retains the rainfall indefinitely, per-

[1] Not meant in the technical sense. They were lands ceded under the Nelson Act to be sold for the Indians.

mitting the run-off to occur largely as ground water and at a quite uniform rate throughout the year.

* * * * *

Of this land, that classified as "wet" is about equally divided between that which has been patented and that still owned by the government, viz, 99,500 acres each. Of the remaining land classified as "dry" probably 33 per cent will be greatly benefited by drainage, or 57,750 acres of patented land and 10,000 acres of government.

So that the system will render 266,750 acres of land valuable for agricultural uses and will benefit the remaining 135,750 acres to a less extent, probably increasing their value half as much as the increase to the entire tract.

From the foregoing description and from the testimony in the record it is apparent that the whole region surrounding Mud Lake for miles was one vast level swamp. It was in general covered with peat from two to six feet deep. In many places it was floating swamp, otherwise designated by some of the witnesses as "wamp" and "muskeg." Ordinarily, with care one could walk over the top of this floating swamp, but there were soft places where he might break through into the water underneath. On Mud Creek, above Mud Lake to the eastward, a witness testified that the bottom of the creek floated to the surface and they had to cut it away for a considerable distance before they could

ascend the creek in boats. (R. 395.) During dry periods the peat in the swamp would catch fire and burn out in places. These were called "burn-outs." The water in them was as deep as the lake (R. 317). Ordinarily one could go across the country in a boat, passing through the "burn-outs" (R. 328, 336). Here and there small knolls or ridges, sometimes sandy or gravelly, rose slightly above the surface of the swamp, and there was some tree growth upon them. A little ridge of this kind, apparently interrupted in places, formed a part of the southern margin of the lake. Elsewhere the bank, where it had a distinguishable bank, was of peat. When the water was high the whole country was covered. All the entrymen kept boats for use in the "burn-outs" in ordinary times and to navigate their farms with when the water was high.

Milton Fordner, a very intelligent witness for the defendants, said (R. 412):

> As a general thing, before those ditches were put in, we always had water. I will explain that to you. The whole country from Mud Lake on, with the exception of the islands, is what we call wamp or floating bottom.

It is apparent that the "islands" he speaks of are islands or high places in the swamp, not islands in the lake. These conditions extend over a great area of the ceded lands to the east and north of Mud Lake region, not embraced in the first drainage survey but covered by a later drainage survey

made with the additional appropriation of $20,000. See House Document No. 27, 61st Cong., 1st sess., pp. 4, 5. On page 5, the engineer in charge of that survey said:

> The character of the vegetation in the swamp depends mainly on the depth of the water. Where it is more than 5 feet deep, it is likely to be covered with what is commonly called "muskeg," a thick growth of moss which fills the water sufficiently to hide it, but yields to the foot, so that one may sink to the knees or waist in the water and often, stepping in a moose track or breaking through, will find it almost impossible to extricate himself and resume his journey.

It is evident, therefore, that Mud Lake was just a part of the great swamp, with the water no deeper there than elsewhere, but not so filled with peat and vegetation. In winter the lake froze to the bottom. In summer it was frequently so dry that fish died on the bed. In one year, at least, a good crop of hay was cut from its bottom. The soil of its bed was practically on a level with the soil under the peat and vegetation of the surrounding swamp.

5. *The drainage plan was promoted by the United States solely to make the swamp lands salable, and thus carry out its obligation to sell them for the benefit of the tribe.*

The Nelson Act contemplated no Indian allotments in this Red Lake Ceded Territory, and none were made. Act January 14, 1889, § 1, 25 Stat.

642. All the lands were to be sold and there would be no Indian farms to be improved. Only about one-half the " wet land " covered by the first government drainage survey had been entered in the eighteen years following the cession—1889 to 1907. The entrymen were isolated during certain seasons and " reduced to dire poverty." House Doc. No. 607, quoted above. One of them said he must have been crazy to take up lands in that region. (R. 353.)

Thirty-five thousand dollars of tribal funds were spent by the United States in making the two drainage surveys. The plan was then changed to one of cooperation with the State, and all the unpatented lands, whether entered or not, were subjected to assessment for drainage and to sale to collect the assessments. Act May 20, 1908, § 3, 35 Stat. 169. Thus the Indians and their tribal lands bore more than half the expense of the drainage.

The swamp and the lake were drained at the same time and by the same means. The main ditch commenced on Thief River far to the southwest, ran through many miles of swamp, then directly through the lake and on to the eastward. None of the lands were fit for agriculture until drained; and, when drained, the lake bed became tillable before the surrounding swamp, because it dried more quickly and was less encumbered with peat and vegetation. It was drained in the summer of 1910, and in 1912 John Knutson raised twelve acres of

" nice barley hay." The next year he got twelve loads of fine millet. (R. 343.)

6. *The fact that these Indian lands were to be sold under the procedure of the homestead law raises no presumption that the intent in conveying uplands bordering nonnavigable waters is to be sought in the local law.*

These lands were sold under an agreement between the Indians and the United States. The procedure and machinery of the homestead law were employed merely as a convenient means of effecting the sales. When the United States disposes of its own lands under the homestead law it makes a free gift to the settler. If he receives more land than his entry and patent describe by taking a portion of the bed of a nonnavigable lake, that is a matter of comparative indifference to the government. There are no national purposes to be subserved by retaining nonnavigable lakes on the public lands. At least there were none when the rule of following the local law was announced in *Hardin* v. *Jordan, supra.* Since then the United States has reserved many such lakes as refuges and breeding places for game and birds.

When Indian lands are sold, as under the Nelson Act, the price is the main and only consideration with the Indians. They have a right to that price for all salable lands. If drainage is necessary to make them salable, then they should receive the agreed price for all that became salable as a result

of drainage. Especially must this be true where they pay a large proportion of the expense of drainage. Otherwise they would lose not only the agreed price for the lands but the cost to them of the drainage, all to the end that a portion of their most valuable heritage should pass already prepared for tillage as a free gift to white men.

In dealing with this ancient property of the Indians the United States is bound to do what is fair and just and equitable to them. The court will not look to the local law to ascertain, by *presumption*, an intent which would work wrong or injustice to its wards.

7. *The intent of the agreement of cession, fairly and justly construed in connection with the status, character, and condition of the lands to which it applied, was that all lands salable, or made salable by drainage, should be sold for the benefit of the Indians, and that conveyances of lands bordering nonnavigable drainable lakes should not pass the lake beds.*

Many of the reasons have already been given or suggested. The rule of following the local law in respect to nonnavigable lakes and ponds was first elaborated and announced by this court in *Hardin* v. *Jordan*, 140 U. S. 371. It was followed by a decision of the same date in *Mitchell* v. *Smale*, id. 406; and some years later in *Kean* v. *Calumet Canal Co.*, 190 U. S. 452. The latter two were decided mainly on the assumption that the beds of the lakes there involved were swamp lands which had passed to

the States under the swamp-land grant. Thus, in *Mitchell* v. *Smale*, p. 414, after stating that the government might *formerly* have limited the grant to the water's edge, this court added:

> But since the grant to the respective States of all swamp and overflowed lands therein, this can not be done.

In *Kean* v. *Calumet Canal Co.* the prevailing party got its title to the uplands from the State of Indiana and the State got its title under the swamp-land grant. The State had selected whole sections as swamp, and the court said the lines of the fractional subdivisions might be protracted over the lake bed (pp. 459, 460). The theory of the court in *Hardin* v. *Jordan* is not so clear. It referred to the fact that the lake was designated on the government plat as "Navigable Lake." But it was the *same lake as that involved in Mitchell* v. *Smale*. In any event, as to all three cases it seems clear that the decisions were made mainly on the assumption that the lake beds belonged to the State, either because the lakes were considered as navigable or because they were really swamp lands. On that theory there was, of course, nothing to do but follow the local law; for if the State, by established rules, relinquished her title to the riparian owners it was no concern of the United States.

In the present case the swamp-land grant did not apply. All the ceded lands were to be divided into two classes only, pine lands and agricultural

lands. The lands with which we are concerned were all in fact swamp lands, but they were necessarily classed as agricultural.

Now, Mud Lake was neither deeper nor more extensive than the lakes involved in the three cases above cited. If the beds of those lakes passed to the States under the swamp-land grant, the bed of Mud Lake must be classed as agricultural land under the terms of the Chippewa cession. We see no escape from this conclusion.

Strong implications are made in favor of Indians in order to carry out the fundamental purposes of treaties or ratified agreements of cessions. The outstanding case is *Winters* v. *United States,* 207 U. S. 564. There the Indians had ceded a portion of their lands, and the portion ceded, as well as the portion retained, was arid. The two tracts were separated by a stream, forming thenceforth a boundary of the reservation. The agreement expressed a purpose to promote the civilization of the Indians and encourage them to cultivate the soil. Nothing was said about reserving water for irrigating their lands, but this court held that there was an *implied* provision reserving to the Indians sufficient water from the stream to irrigate the irrigable lands reserved. The application of that case to the present situation is obvious, and it seems to us controlling.

An additional reason is that Mud Lake in its natural condition was more valuable to the Indians than any of the swamps surrounding it or, indeed,

than any equal area of the best agricultural lands within the reservation. It was capable of furnishing them food in abundance. Vast numbers of ducks and wild geese resorted to it; and after the cession hunters came to it from all parts of the State—"scores of them" from Minneapolis. They came both for sport and commercial profit. A freezer was brought in, and the game was killed, frozen, and shipped to the cities for sale. (R. 336, 408.) Could the Indians have supposed that they were to receive nothing at all for what was most valuable to them?

Many of the shallow lakes ceded by this same treaty from this and other Chippewa reservations grew great quantities of wild rice. It was the main vegetable food of the Chippewas—their most highly prized article of diet. They stored and kept it, and the rice crop alone often stood between them and starvation after the game grew scarce. See House Document No. 539 (56th Cong., 2d sess., vol. 119), being the Nineteenth Report of the Bureau of Ethnology, Pt. 2, 1898, pp. 1019–1137, "The Wild Rice Gatherers of the Upper Lakes," by Albert Ernest Jenks. Must it be held that these Indians must have no further use of these small shallow lakes and no compensation for their beds when drained? Mud Lake, it is true, was apparently not a wild-rice lake, but it was extremely valuable to the Indians for its wild fowl.

8. *On the faith of the decision of the Secretary of the Interior that the bed of Mud Lake was salable*

Indian land, it was entered in good faith by citizens of the United States, who will lose their time and effort if the riparian claimants prevail.

This is an equitable consideration entitled to some weight if any way can be found to give effect to it. Of course, if the Secretary of the Interior and the Attorney General were clearly wrong and the title had in fact passed to the riparian owners, that is the end of the matter. But the decision of the question was one which the Secretary was authorized to make, and until he made it and took steps to carry it out there was no way in which the rights of the Indians could be tested in court. His decision and the entries made in accordance with it created a status now existing which it is inequitable to disturb, and which should not be disturbed by resorting to a mere presumption of intent, if a contrary intent may be found or reasonably inferred from the terms of the cession and the conditions to which they must be applied.

9. *Oklahoma* v. *Texas, in so far as it applied the local law to former Indian riparian lands, is not controlling here.*

The distinguishing features are:

1. The Indian lands there involved were not ceded to the United States for sale. On the contrary, Congress, without consulting the Indians, by an exercise of its plenary authority over their property, directed that their lands be allotted, in part, and the remainder sold for their benefit. The

Indians were, in fact, opposed to the plan and attacked the law as unconstitutional. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553. Having directed the disposal on its own sole authority, just as it might direct the disposal of lands owned absolutely by the United States, it was reasonable to infer that Congress intended that the usual incidental rights should attach to purchases of riparian lands.

2. At the time the allotments and sales were made the river bed was considered as utterly worthless for any use or purpose.

3. The allotments were fractional and insufficient to put the allottees on an equality with earlier allottees; and when the river bed was discovered to be valuable for oil the Government felt they were equitably entitled to those values. It therefore admitted their claim of title as far as the middle of the river, and only opposed the application of the local law in so far as it was claimed to give them title beyond the middle and as far as the south bank. This necessarily involved a similar admission as to white purchasers of Indian riparian lands, and that admission was made.

4. All other claimants *relied* on the local law: some claiming, however, that the original statute had been changed so as to limit the grant to the uplands, others claiming that it gave them the whole river-bed in front of their meandered lands.

So that no question was really raised, involved, or decided as to whether submerged Indian lands, *ceded by agreement* for purposes of sale, and known

to be valuable when ceded and when the riparian lands were sold, would pass to the riparian owners in accordance with the local law.

II

On the assumption that Mud Lake was navigable

1. *The Red Lake Reservation was never within the jurisdiction or under the sovereignty of the State; and even if navigable Mud Lake and its bed did not vest in the State on her admission to the Union.*

The fundamental principle was stated by Chief Justice Marshall in *Worcester* v. *Georgia,* 6 Pet. 515, 557, as follows:

> The treaties and laws of the United States contemplate the Indian territory as *completely separated from that of the States;* and provide that all intercourse with them shall be carried on exclusively by the Government of the Union.

That fundamental principle has never been modified or departed from by this court, and it lies at the foundation of all the dealings of the United States with Indians up to this time. It was announced as to Indian lands lying within an original State (Georgia), and it was further declared that the Indian tribes were self-governing bodies and the State had no power to extend her laws over their lands or interfere with their social relations. The same doctrines have been uniformly applied to States since admitted. *The Kansas Indians,* 5 Wall. 737, 756, 758, 759; *The New York Indians,*

5 Wall. 761; *Fellows* v. *Blacksmith,* 19 How. 366; *Jones* v. *Meehan,* 175 U. S. 1; *United States* v. *Nice,* 241 U. S. 591, 598; *United States* v. *Waller,* 243 U. S. 452, 459.

Some of the new States, on their admission to the Union, were required to disclaim any jurisdiction or sovereignty over tribal Indians and their lands, and sometimes the courts have relied on such disclaimers. But such disclaimers could not vest in the United States any powers not already possessed under the Constitution. *United States* v. *Sandoval,* 231 U. S. 28, 38; *Coyle* v. *Oklahoma,* 221 U. S. 559, 574. Nor could they operate to withhold from a new State any attributes of sovereignty necessary to place her on an equal footing with the original States. Manifestly, they are of the same character and were exacted for the same purpose as the disclaimers of power to tax Government property or interfere with the primary disposal of the soil. In other words, they are merely declaratory of the preexisting law as announced in the early cases above cited. *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 167.

Minnesota made no such disclaimer, but she was bound by the preexisting law whether she expressly accepted it or not.

The lake and its bed belonged to the Indians, just as did the surrounding reservation territory. It was a part of their ancient domain, and they held it by the same right and title. They had in it the full beneficial interest for all available purposes,

including the waters and the lands under the waters. The United States, as we now express it, owned the fee, but that means, as shown by the older cases, only that the United States had the sole and exclusive right, as against all other nations and people, and as against its own citizens, to purchase the territory from the Indians or to extinguish their rights by conquest or otherwise. *Worcester* v. *Georgia,* 6 Pet. 515, 545; *Fletcher* v. *Peck,* 6 Cranch, 87, 141; *Johnson* v. *McIntosh,* 8 Wheat. 543, 592. As recently as 1872 this court described the Indian title thus:

> Unmistakably their title was absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right * * * to prohibit the sale of the land to any other governments or their subjects * * *.
>
> *Holden* v. *Joy,* 17 Wall. 211, 244.

The Indian right of occupancy and use extended not only to the surface but to all the hidden or latent resources, such as minerals, water power, value for rights of way, etc. 34 Op. 171, 178–181, where the decisions and Acts of Congress recognizing such rights are cited.

Because, therefore, the Indian reservation, its waters, and the lands under them were never under the jurisdiction or sovereignty of the State, the lake and its bed did not vest in the State. At the time of her admission these lands and waters were devoted by the United States to a great public purpose "appropriate to the objects for which the

United States hold the Territory." *Shively* v. *Bowlby,* 152 U. S. 1, 48.

2. *By the Act and agreement of cession the Indian lands held in trust for sale were to pass from the United States direct to the purchasers, and there was no time when title to the lake bed could vest in the State.*

This follows as a matter of course, if we are right in our conclusions that the lake was merely a part of the surrounding swamp and classifiable with it as agricultural land under the terms of the cession.

CONCLUSION

The title to the lake bed never passed to the State, either by virtue of her sovereignty or under the swamp-land grant. The United States could therefore sell the riparian lands independently of the lake bed. An intent to sell the beds of shallow, drainable lakes as agriculturable lands for the benefit of the Indians was shown by the strongest implications in the Act under which the cession was made. The intent being thus shown, there was no occasion to look to the local law for a *presumed* intent, which would defeat the reasonable understanding of the Indians and work them wrong and injury. If we are mistaken in this, and if the court shall find that the lake was nonnavigable, then, as its bed did not pass to the State under the swamp-land grant, as in *Mitchell* v. *Smale* and *Kean* v. *Calumet Co., supra,* the United States could limit its conveyances by the meander line. This it did in

a number of the patents, and there should be a reversal as to the lake bed lying in front of the shore lands so patented.

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APRIL, 1925.

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